No. 92-515

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF WISCONSIN,

PETITIONER,

v.

TODD MITCHELL,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WISCONSIN

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QUESTION PRESENTED

Does the First Amendment prohibit states from providing greater maximum penalties for crimes if the fact-finder determines that the criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion, or other specified status?

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT

1. This is a sentencing case. Unlike the ordinance at issue in *R.A.V.* v. *City of St. Paul, Minnesota*, __U.S.__, 112 S.Ct. 2538 (1992), the Wisconsin sentencing enhancement statute criminalizes nothing.

2. This Court has emphasized again and again that the sentencing process requires a broad inquiry by the sentencing authority into both the qualities of the crime and those of the criminal.

3. The rule announced by the Wisconsin Supreme Court in the opinion below would greatly undermine the ability of sentencing authorities to inquire into the moral and motivational qualities of criminals in the sentencing process.

4. The decision of the Wisconsin Supreme Court is contrary to the precedents of this Court, which has held that the racial motivation of a crime is relevant to sentencing for that crime.

5. The decision below is not only contrary to the precedents of this Court, it is contrary to reason. Not even those legal philosophers most anxious to separate the law from morality would argue that the moral qualities of a criminal should be ignored at sentencing.

TABLE OF AUTHORITIES

CALIFORNIA PENAL CODE

RULES OF THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES CONSTITUTION

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Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Gil Garcetti, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States.

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INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State of California, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter -- which raises the issue of the constitutionality of a sentencing enhancement based upon the ethnic, religious or other group affiliation -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. In particular, California has enacted "hate crimes" statutes, California Penal Code sections 422.6, 422.7, 422.75 and 11411, the validity of which may be placed at issue by this Court's resolution of the case at bar.

It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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By

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THIS IS A SENTENCING CASE, AND THIS COURT HAS REPEATEDLY EMPHASIZED THAT THE RACIAL MOTIVATION OF A CRIME IS A LEGITIMATE FACTOR IN SENTENCING FOR THAT CRIME

This is a sentencing case. The Wisconsin statute permits the sentencing authority to impose a longer prison term or a higher fine, where a crime is committed "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wisconsin Stats. sec. 939.645(1)(b). The statute criminalizes nothing. Everything that it covers is already criminal. And, the constitutionality of the underlying crimes is not questioned and is not at issue in the instant case.

1. *R.A.V. v. City of St. Paul, Minnesota* distinguished.

As such, the statute in the instant case is to be distinguished from the St. Paul ordinance at issue in *R.A.V. v. City of St. Paul, Minnesota*, __U.S.__, 112 S.Ct. 2538 (1992). In that case, a divided Court recently ruled that the particular hate-crime ordinance involved was unconstitutional under the First Amendment. The first distinction to be noted between the two statutes has already been alluded to: The St. Paul ordinance criminalized symbolic actions merely because they caused "anger, alarm or resentment." *Id.* at 112 S.Ct. 2559. By contrast, the Wisconsin sentencing enhancement creates no new crime or crimes. Every act or expression which was legal before the act was passed remains legal, no matter how heinous or revolting it might be to others.

The other side of this distinction is that, while the Wisconsin statute protects more people than did the St. Paul ordinance -- protecting alike majorities as well as minorities, as the facts of the present case illustrate -- the Wisconsin statute is more narrowly circumscribed so as to avoid the overbreadth problems inherent in the St. Paul ordinance. Specifically, the four-member minority in *R.A.V.* found that the statute in that case "criminalizes a substantial amount of expression that -- however repugnant -- is shielded by the First Amendment." *Id.*, at 112 S.Ct. 2559. The Wisconsin sentencing enhancement does no such thing. The object of the Wisconsin statute is ordinary

crime, not expressive conduct of any sort. Overwhelmingly, we are speaking of common crimes against persons and property. As such, the Wisconsin law, already tailored to the needs of protecting the security of the citizenry, is particularly inappropriate for the sweeping application of overbreadth analysis, such as applied in *R.A.V.* As this Court explained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), in setting forth the test for facial invalidity:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function . . . attenuates as the otherwise unprotected behavior . . . moves from "pure speech" toward conduct and [when] that *conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws* . . . .

Id., at 615 [emphasis added].

In sum, whereas *R.A.V.* sought to make criminal acts which were merely repugnant, the Wisconsin sentencing enhancement creates no new crimes. Actions, expressive or not, which were legal before remain legal now. Furthermore, the Wisconsin statute, even were it less than perfectly fitted to the task, is particularly inappropriate for application of the overbreadth analysis applied by the four-member minority in *R.A.V.*

2. Sentencing is a process demanding broad inquiry into the characteristics of both the criminal and the crime.

This Court has repeatedly emphasized that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material." *Payne v. Tennessee*, 111 S.Ct. 2597, 2606 (1991). As the Court put it in *United States v. Grayson*, 438 U.S. 41 (1978):

> "[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."

Id., at 50, quoting from *United States v. Tucker*, 404 U.S. 443, 446 (1972).

Thus, at a time when indeterminate sentencing regimes were popular, this Court distinguished between the evidentiary limitations upon findings of guilt and the wide discretion long implicit in the sentencing process:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
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> . . . . [¶]
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> Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Williams v. People of State of New York, 337 U.S. 241, 246-47 [footnotes omitted].

The more recent trend towards determinate sentencing regimes is also consistent with constitutional principles, whether it takes the form of strictly specified sentences, mandatory sentencing guidelines or -- as in the case of the Wisconsin sentencing enhancement -- discretionary sentencing factors. See *Chapman v. United States*, __U.S.__, 111 S.Ct. 1919 (1991) [mandatory sentencing enhancement]; *Mistretta v. United States*, 488 U.S. 361 (1989) [federal sentencing guidelines].

3. The approach advocated by the majority of the Wisconsin Supreme Court would turn our sentencing system on its head.

Although the majority of the Wisconsin Supreme Court seems unaware of it, the implications of the logic of the lower court decision upon sentencing law and practice would be

profound. If allowed to stand, it would essentially erect the First Amendment as a barrier between the sentencing judge and the necessarily wide-ranging inquiry appropriate to a just sentencing regime. The keystone of the Wisconsin court's decision is its notion that "[t]he First Amendment protects not only speech but thought as well." *State v. Mitchell*, 485 N.W.2d 807, 811. This notion leads the majority below to conclude that the defendant was being punished "because of" his motives in committing the crime, and because his motives implicated his thoughts, therefore he was being punished for his thoughts in violation of the First Amendment.

But surely this argument proves too much. Contrary to the Wisconsin majority, motives are often of great relevance to a court's imposition of sentence. For example, in California, there are statutes which expressly provide that motivation may constitute an aggravating factor supporting imposition of the death penalty. (See, e.g., California Penal Code section 190.2(a)(1), providing for imposition of the death penalty in the case of murders "carried out for financial gain.") Just as motive is relevant evidence in determining the guilt of a defendant, so it is relevant in considering the moral blameworthiness of the defendant at sentencing. That his motives -- or, "thoughts" -- are relied upon as evidence of that moral blameworthiness no more implicates the First Amendment than does admission of a confession at trial.[1]

But the problems with the approach taken by the court below do not end here. If motive implicates "thought," which is protected by the First Amendment, then factors such as a defendant's remorse or lack of remorse -- which, after all, are "thoughts," or, at least, attitudes -- would be rendered protected by the First Amendment and therefore beyond the bounds of consideration. Presumably, efforts by a judge to base a mitigated sentence upon a defendant's devout religious beliefs, commitment to family values or belief in the Protestant work ethic would

1. As the Court noted in *Street v. New York*, 394 U.S. 592 (1969): "Assuming that . . . a conviction would otherwise pass constitutional muster, . . . nothing would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way. *Id.*, at 394 U.S. 596; accord *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

similarly be an intrusion upon First Amendment values, according to the Wisconsin majority. Conversely, a defendant's dissolute character, his personal commitment to the brutal extermination of his enemies, or his contempt for the value of human life in general could not be considered as permissible grounds for imposition of an aggravated sentence.

The problem with the Wisconsin Supreme Court's conception is not that beliefs are unprotected by the First Amendment, but that it is the *expression* of those beliefs which implicate Constitutional protection, and that, even then, such expression does not implicate First Amendment protection within the context of the judicial process, including sentencing. There can be no doubt, for example, that a sentencing enhancement inviting imposition of a stiffer sentence upon Republicans would violate the First Amendment. But such a law would run afoul of the First Amendment not because it punishes thought but because it singles out a particular, presumably unpopular viewpoint, to the exclusion of other, contrary values.

By contrast, it should be noted that the Wisconsin statute is both symmetric and all-inclusive in its operation. That is, in the former regard, the statute is not designed to protect particular ethnic, religious or other groups; on the contrary, it is designed to protect all such groups. As the instant case amply illustrates, this law protects members of the majority afflicted by racial, religious, etc., attacks as much as it protects members of insular minorities. It does not play favorites. In this sense, it is "symmetrical" amongst the various groups addressed by the statute.

But the statute at issue is not only symmetrical; it is also, with one clearly-permissible exception (discussed below), all-inclusive. As noted, the statute expressly protects victims of crimes committed "because of race, religion, color, disability sexual orientation, national origin or ancestry. . . ." sec. 939.645, Mich. Stats. The fact is that everyone has a race, a color, a sexual orientation, a national origin or ancestry and a "religion," if one but allows that agnostic or atheist views are also religious opinions, within the meaning of the statute.

As noted, there is one exception to the complete all-inclusiveness of the Wisconsin statute. That is its specification of special severity of possible sentence based upon "disability." But physical (or mental) disability is demonstrably a condition -- well

acknowledged and historically confirmed -- which justifies particular consideration in imposition of a severe sentence in cases involving disabled victims of crime. It hardly requires sociological data or population surveys to appreciate that a person who is in a wheel-chair or who is blind may be an especially attractive target for criminal attack and therefore may be an especially vulnerable victim worthy of particular protection. Criminal statutes of this nation have long accorded special protection to the demonstrably vulnerable. In California, for example, we have statutes which protect persons over 65 years of age, by adding a sentencing enhancement based upon the age of the victim. See California Penal Code section 1203.09. This clearly reflects heightened concern for the vulnerability of such elderly victims. Similarly, there can be no reasonable doubt that statutes giving special protection to children from sexual and other abuse are constitutional. Because children are particularly vulnerable to such abuse, we have long provided special protections for them in the form of specialized criminal statutes and sentencing schemes. See, e.g., California Penal Code section 288.

4. The lower court's ruling is manifestly contrary to Constitutional precedent.

The lower court's decision in the case at bar is not only contrary to the general tenor of the constitutional law governing sentencing. It is manifestly contrary to constitutional precedents. This Court has expressly held that the racial motivation for a crime is a valid ground for imposing an aggravated sentence, *Barclay v. Florida*, 463 U.S. 939, 949-50 (1983), a view reaffirmed unanimously by the Court just last term in *Dawson v. Delaware*, 112 S.Ct. 1093, 1097 (1992).[2]

In *Barclay*, petitioner and his cohorts set out with the apparent purpose of indiscriminately killing white persons,

2. Although Justice Thomas dissented from the judgment, he left no doubt that he supported the majority's conclusion in this regard. In fact, from all appearances, he would have gone further than the majority. (See 112 S.Ct. at 1100-05.)

thereby provoking a racial war. In furtherance of this cause, they killed a white hitchhiker in Florida. Petitioner was convicted of first-degree murder, and the jury recommended life imprisonment. But the sentencing judge overruled the jury's recommendation and sentenced petitioner to death, based in part upon the "nonstatutory aggravating circumstance of racial hatred." 463 U.S. at 949. On review, this Court rejected petitioner's argument that this was error:

> The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors.

Ibid.

In *Dawson v. Delaware*, *supra*, the Court rejected -- on First Amendment grounds -- reliance upon membership in a racist organization where that had *no* relevance to the offense committed. But, in so doing, the Court expressly reemphasized its commitment to the principle adopted in *Barclay*:

> In *Barclay*, . . . the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a "racial war," were related to the murder of a white hitchhiker. We concluded that it was most proper for the sentencing judge to "tak[e] into account the elements of racial hatred in this murder."

Dawson v. Delaware, supra, at 112 S.Ct. 1098 [citation omitted].

The Wisconsin statute at issue in the instant case is demonstrably consistent with the principle announced in *Barclay* and reaffirmed in *Dawson*. Under the Wisconsin statute, the racial, religious, etc., motivation of the crime is necessarily directly relevant to the reason behind the crime itself: The statute prescribes that the crime must have been committed "because of" the race, religion, etc., of the victim. In effect, the statute amounts to a determination by the Wisconsin legislature that the sentencing authority ought to be free and be encouraged to consider the racial, religious, etc., motivation of a crime as a general matter. It renders consideration of the racial, religious, etc., motivation of the crime systematically subject to consideration of the sentencing judge, rather than leaving such consideration to ad hoc application. It does not *require* a

sentencing judge to impose a higher term. It merely gives him the option of imposing an aggravated sentence if a specific finding is made by the trier of fact -- just as the finding of aggravation based on the racial motivation of the crime permitted the judge in *Barclay* to impose the death penalty.

Certainly, there would seem to be no reason to believe that the limits upon a sentencing judge in non-death-penalty cases should be *more restrictive* than the limits applicable to imposing the death sentence, as in *Barclay*. It follows that the Court can hardly strike down the Wisconsin enhancement statute without raising serious doubts about the continuing viability of the rule of *Barclay* and *Dawson*, *supra*. This in turn would threaten to cripple -- and would certainly chill -- the ability of prosecuting authorities to introduce evidence relating to a whole host of issues concerning to the defendant's actions or character traits, regarding race, religion, etc., etc, most notably at penalty-phase trials in death penalty cases. Such a ruling would, at the very least, fundamentally undermine this Court's commitment to making death penalty penalty-phase trials into a fair fight. *Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

5. The extreme restrictions proposed by the Wisconsin Supreme Court are contrary to the conceptions even of those legal philosophers most anxious to separate law from morality.

Such draconian restrictions upon the range of a sentencing judge's discretion as have been proposed by the Wisconsin Supreme Court are not only contrary to our common law and constitutional traditions; they are also contrary to reason and logic. Even those legal philosophers most anxious to separate law from morality have not sought to deny the relevance of a defendant's thoughts, motivations, attitudes and other moral qualities to the imposition of sentence. The famous positivist H. L. A. Hart, for example, was at great pain to emphasize the relevance of such factors to sentencing. Replying to accusations that positivists might not consider such moral factors in affixing punishment without inconsistency, Hart answered that

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> [t]here are many reasons why we might wish the legal gradation of the seriousness of crimes, expressed in its scale of punishments, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice or fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike.

H.L.A. Hart, *Law, Liberty and Morality* 36-37 (1963).

Hart concluded that the "wickedness" of a criminal, while not itself constituting a crime, is certainly relevant to the degree of punishment:

> [T]hose who concede that we should attempt to adjust the severity of punishment to the moral gravity of offences are not thereby committed to the view that that punishment for immorality is justified. For they can in perfect consistency insist on the one hand that the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished, and, on the other, agree that when the question of the *quantum* of punishment for such conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment.

Id., at 37 [emphasis in original].

If the general "wickedness" of a defendant is relevant to the degree of punishment to which he may be subjected, then so also certainly are his thoughts and motivations in committing the crime at issue. In its pursuit of the coldest logic, the Wisconsin Supreme Court has chosen to ignore the most central and respected elements of our sentencing process. Rather than positively reforming that process, the Wisconsin proposal amounts to an unprecedented rejection of centuries of sentencing theory and practice.

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CONCLUSION

In conclusion, and for the reasons set forth above, this Court should reverse the ruling of the Wisconsin Supreme Court and should hold that the Wisconsin sentencing enhancement is consistent with the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted on behalf of the
California District Attorneys
Association, and the District Attorney
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